Chicago-Kent Law Review

Volume 52
Issue 3 *Law and Technology Symposium*

Article 11

January 1976

The Detainer Process: The Hidden Due Process Violation in Parole Revocation

Margaret J. Frossard

Margaret J. Frossard

THE DETAINER PROCESS: THE HIDDEN DUE PROCESS VIOLATION IN PAROLE REVOCATION

When a parolee commits an intervening offense while on parole, he has the right to a speedy trial on that offense[1] and the right to a prompt hearing by the parole board on the question of whether his parole will be revoked.[2] In practice, however, if the crime is committed in a federal or state jurisdiction beyond the control of the original paroling authority, the revocation hearing is delayed until the parolee serves the intervening sentence. The delay in holding the revocation hearing may severely limit the parolee's chance for a fair revocation hearing by depriving him of the opportunity to prevent reincarceration, preserve evidence, and gain concurrent sentences.

The delay results in a parole revocation warrant being lodged against the prisoner which triggers a mechanism known as a detainer. The detainer may adversely affect the parolee's conditions of confinement and deny him access to various rehabilitation opportunities.[3] The delay in conducting the parole revocation hearing then serves to prolong the detrimental effects of the detainer it initiated.

The federal and state courts apply a grievous loss test to determine whether delay violates due process.[4] Whether the effects of delay cause

1. Smith v. Hooey, 393 U.S. 374 (1969).
2. Morrissey v. Brewer, 408 U.S. 471 (1972).
3. Shelton, *Unconstitutional Uncertainty: A Study of the Use of Detainers*, 1968 U. MICH. J.L. REF. 119, 122 [hereinafter cited as Shelton].
4. The federal cases opposed to delayed parole revocation proceedings, finding delay causes grievous loss include: United States *ex rel.* Hahn v. Revis, 520 F.2d 632 (7th Cir. 1975); Wingo v. Ciccone, 507 F.2d 354 (8th Cir. 1974); Wells v. Wise, 390 F. Supp. 229 (N.D. Cal. 1975); Fitzgerald v. Sigler, 372 F. Supp. 889 (D.D.C. 1974); Jones v. Johnston, 368 F. Supp. 571 (D.D.C. 1974); Sutherland v. United States Board of Parole, 366 F. Supp. 270 (D.D.C. 1973). The state cases opposed to delay, finding delay causes grievous loss include: Wright v. Regan, 361 N.Y.S.2d 437 (1975); *In re* Rixner, 39 Cal. App. 3d 465, 114 Cal. Rptr. 147 (1974); *In re* Valrie, 12 Cal. 3d 139, 524 P.2d 812, 115 Cal. Rptr. 340 (1974); Callison v. Michigan Department of Corrections, 56 Mich. App. 260, 223 N.W.2d 738 (1974). The federal cases in favor of delayed parole revocation, finding delay does not cause grievous loss are: Small v. Britton, 500 F.2d 299 (10th Cir. 1974); Cook v. United States Att'y Gen., 488 F.2d 667 (5th Cir.), *cert. denied*, 419 U.S. 846 (1974); Burdette v. Nock, 480 F.2d 1010 (6th Cir. 1973); Noorlander v. United States Att'y Gen., 465 F.2d 1106 (8th Cir. 1972), *cert. denied*, 410 U.S. 938 (1973). The cases in favor of delayed parole revocation, finding delay does not cause grievous loss include: Cooper v. Lockhart, 489 F.2d 308 (8th Cir. 1973); Pavia v. Hogan, 386 F. Supp. 1379 (N.D. Ga. 1974); State v. Sheehy, 114 N.H. 305, 337 A.2d 348 (1975); Duncan v. Ricketts, 232 Ga. 89, 205 S.E.2d 274 (1974).

grievous loss depends on a balancing of the interests involved.[5] The more important threshold question is whether the nature of the parolee's interest is within the contemplation of the "liberty or property" language of the due process clause.[6]

Determination of whether due process requires a prompt revocation hearing demands an understanding of the purpose of the parole revocation hearing and the nature of the interests affected by revocation delay. This writer believes that the proponents of delay misunderstand the purpose of the hearing and undervalue the parolee's interests affected by delay. The Supreme Court has refused to review the constitutionality of parole revocation delay when the parolee is serving time for an intervening crime.[7] This position should be reviewed in light of the confused and conflicting decisions in the lower courts and the serious constitutional issues raised.

The prompt hearing proposed by some courts as a solution to the adverse effects of parole revocation detainers is only a partial solution to the effects of delay. Under such a proposal the parolee would no longer be deprived of the opportunity to prevent reincarceration, preserve evidence and gain concurrent sentences. The prompt hearing would also remove the parole revocation detainer. The possibility remains, however, that the parole board could impose consecutive sentencing at that hearing.[8] In that case, the detainer would remain intact as a consecutive sentence detainer with the same adverse effects on the parolee's conditions of confinement and opportunities for rehabilitation[9] as under a parole revocation detainer. Thus, the due process violation attributable to the detainer would not be eliminated. This due process violation would amplify the consecutive sentencing penalty.[10] The only complete solution to the delay-detainer problem is one which combines a prompt revocation hearing with elimination of the adverse effects of the detainer mechanism.

5. 408 U.S. 471 (1972).

6. Fuentes v. Shevin, 407 U.S. 67 (1972), *quoted in* Morrissey v. Brewer, 408 U.S. at 480.

7. Cook v. United States Att'y Gen., 488 F.2d 667 (5th Cir.), *cert. denied*, 419 U.S. 846 (1974); Noorlander v. United States Att'y Gen., 465 F.2d 1106 (8th Cir. 1972), *cert. denied*, 410 U.S. 938 (1973).

8. United States *ex rel.* Hahn v. Revis, 520 F.2d 632 (7th Cir. 1975).

9. Dauber, *Reforming the Detainer System: A Case Study*, 7 CRIM. L. BULL., 669 (1971) [hereinafter cited as Dauber].

10. The consecutive sentence is amplified or made more burdensome due to the continued existence of the detainer because prisoners consecutively sentenced are often treated as maximum security risks and denied the opportunity to participate in rehabilitation programs which require a less restrictive environment such as education, recreation and work release programs. These limitations on freedom are supported by the assumption that consecutive sentence prisoners are greater escape risks. This assumption is completely destroyed in the article by Dauber, *supra* note 9 at 673, where he points out that a person sentenced to six years for a crime will not necessarily have any less incentive to escape than a prisoner with two three year consecutive sentences to be served at different institutions.

THE FACTUAL SETTING OF THE DELAYED PAROLE REVOCATION HEARING

Familiarity with the factual circumstances which give rise to the problems caused by delayed parole revocation hearings is basic to an understanding of the constitutional controversy surrounding delay. The problem begins when the petitioner is in the process of serving a sentence for an offense constituting a violation of the conditions of parole granted from an earlier federal or state sentence. Because the second offense constitutes a parole violation, a parole violator warrant is issued by the original parole authority and lodged as a detainer against the prisoner at his present place of incarceration. Execution of the warrant and a hearing on the underlying charges is delayed until the intervening sentence is completed in accordance with a standard practice of the U.S. Parole Board, implemented by prison officials acting as its agents.[11] A similar policy is also followed by various state parole boards.[12]

The parole revocation warrant remains lodged as a detainer against the prisoner until the intervening sentence is completed. The detainer is simply a communication sent to the prison, usually by the parole board, asking to be informed by the prison officials when the inmate serving the intervening sentence is to be released.[13] Parole revocation detainers can be like a consecutive sentence detainer in that the parole board has the discretion to hold open the possibility of making the parolee serve the remainder of his original sentence after completion of the intervening sentence.[14] Thus, pending action by the parole board, consecutive sentence status may be imposed de facto upon the prisoner who has a revocation detainer lodged against him. Prisoners who are consecutively sentenced are often classified as maximum security risks and denied the opportunity to participate in rehabilitation programs which require a less restrictive environment such as education, recreation and work release programs.[15] These limitations on freedom are supported by the assumption that consecutive sentence prisoners are greater escape risks.[16]

Significantly, state parolees who commit state crimes in the paroling state, or federal parolees who commit other federal crimes in the same

11. Cook v. United States Att'y Gen., 488 F.2d 667 (5th Cir.), *cert. denied,* 419 U.S. 846 (1974).

12. In Illinois, although the policy is to grant a revocation hearing promptly, in practice, if the crime is committed in a federal or state jurisdiction beyond the control of the original paroling authorities, then the revocation hearing is delayed until the intervening sentence is completed, according to interviews conducted November 19, 1975 with Jeffrey Doane, Legal Counsel for the Illinois Parole Board, and Lawrence Pusateri, former President of the Illinois Bar Association and co-author of *Illinois' New Unified Code of Corrections*, 61 ILL. B.J. 62 (1972).

13. Dauber, *supra* note 9, at 673.

14. United States *ex rel.* Hahn v. Revis, 520 F.2d 632 (7th Cir. 1975).

15. Shelton, *supra* note 3, at 122.

16. *Id.*

district are not subjected to the deprivations which result from delayed parole revocation hearings. The state or federal authorities in that situation have no reason to issue and leave unexecuted a parole violator warrant acting as a detainer, because the prisoner is already present at the original custodial institution. However, when the parolee commits a dissimilar[17] intervening crime, both federal and state parole boards circumvent the requirement for prompt revocation hearing by treating the parolee as a person with a "hold-order" over him, warranting postponement of revocation until the sentence for the intervening crime is served.[18]

The federal and state courts disagree as to whether this practice violates due process by causing grievous loss to the parolee-prisoner.[19] Their conflicting interpretation of grievous loss is due to a fundamental disagreement as to the nature of the parolee's interest and the purpose of the revocation hearing. The Supreme Court delineated a grievous loss test in *Morrissey v. Brewer*[20] to determine whether due process was violated by denying prisoners the right to a parole revocation hearing. An understanding of the grievous loss test as applied in *Morrissey* is the starting point for clarifying the issues raised by the delay controversy.

The Grievous Loss Test As Applied To Delayed Parole Revocation Hearings

The Supreme Court in *Morrissey v. Brewer*[21] first recognized the parolee's right to due process within the context of a parole revocation hearing. The Court rejected the concept that the right to due process in a parole revocation context depended upon whether the parolee's liberty was characterized as a right or as a privilege. In *Morrissey*, two parolees appealed on the ground that their paroles were revoked without a hearing, depriving them of due process. The court of appeals in affirming the district court, had reasoned that parole is only a "correctional device authorizing service of sentence outside a penitentiary." It concluded that a parolee is thus still "in custody," and not entitled to a full adversary hearing, as he would be in a criminal proceeding.

In reversing the court of appeals decision, the Supreme Court recognized the parolee's interests were of such a nature as to invoke the protection of due process:

> [T]he liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others. It is hardly

17. A "dissimilar" intervening crime is one committed in a federal or state jurisdiction beyond the control of the original paroling authorities.
18. Shelton, *supra* note 3, at 119 n.10.
19. Cases cited *supra* note 4.
20. 408 U.S. 471, 484 (1972).
21. *Id.*

> useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a "right" or a "privilege." By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.[22]

Thus, the Court recognized that the nature of the parolee's interest is within the contemplation of the "liberty" language of the due process clause. The court defined grievous loss as termination of the parolee's liberty without some orderly revocation procedure.

The Court concluded that due process required two stages in the revocation procedure. First, there must be a prompt informal inquiry near the place of the alleged parole violation to determine whether the alleged violation can be substantiated by probable cause.[23] Second, following this preliminary hearing, a full revocation hearing must be held "within a reasonable time." The purpose of the hearing is to determine whether the parolee should be reincarcerated for the protection of society, to consider mitigating evidence, and to decide what steps should be taken toward rehabilitating the parolee. The Court indicated an understanding that the purpose of the revocation hearing goes beyond whether the parolee should be reincarcerated for the violation, and should include consideration of mitigating evidence and rehabilitation possibilities.[24]

The Court concluded that whether any procedural protections are due depends on the extent to which an individual will be "condemned to suffer grievous loss."[25] The grievous loss test requires a balancing of the governmental interests furthered by delay against those interests of the parolee which delay affects adversely.[26] The important question, as *Morrissey* noted, is not the weight of the individual interests, but whether the nature of the interests is within the contemplation of the "liberty or property" language of the due process clause.[27]

The Court failed to resolve, however, whether hearing delay causes grievous loss when the parolee is in the custody of a different governmental

22. *Id.* at 484.
23. *Id.*
24. *Id.* at 488.
25. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951), *quoted in* Goldberg v. Kelly, 397 U.S. 254, 263 (1970) and *quoted in* Morrissey v. Brewer, 408 U.S. 471 (1972).
26. Beshers v. Ciccone, 517 F.2d 1082 (8th Cir. 1975). *Cf.* Barker v. Wingo, 407 U.S. 514, 532, 533 (1972). In holding that petitioner's right to a speedy trial is subject to a balancing test, the decision analogously supports the application of a similar balancing test to parole revocation delay because similar interests are at stake. The Supreme Court said that loss must be assessed in light of the the interests of the petitioner including: (1) Prevention of oppressive incarceration; (2) minimizing anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired.
27. Fuentes v. Shevin, 407 U.S. 67 (1972), *quoted in* Morrissey v. Brewer, 408 U.S. 471, 480 (1972).

authority serving a sentence for an intervening crime. Courts are split on what constitutes grievous loss.[28] The way in which courts regard the nature of the parolee's interest and the purpose of the revocation hearing significantly affects their conclusions on the question of grievous loss.

In applying the due process analysis the proponents of delay never utilized a balancing test because they concluded that the parolee had no constitutionally protected interest.[29] Although these courts recognize that the parolee's liberty is being denied without a hearing, they contend that this consideration is no longer compelling because the conviction for the intervening crime justifies the deprivation of liberty.[30]

According to the proponents of delay, the sole purpose of a revocation hearing is to decide whether parole should be revoked.[31] Their test for grievous loss reflects this emphasis. A prisoner must demonstrate that delay adversely affected the decision to revoke parole. In most cases, the parolee's conviction for the intervening crime will provide sufficient legal justification for revoking parole.[32] If parole is revoked as a result of the intervening conviction then implicitly the parolee will be unable to demonstrate to the satisfaction of these courts that delay of the hearing caused grievous loss.[33]

Other courts oppose a test which requires a prisoner to demonstrate that

28. Cases cited note 4 *supra.*

29. The federal cases in favor of delayed revocation hearings, finding delay does not cause grievous loss are: Small v. Britton, 500 F.2d 299 (10th Cir. 1974); Cook v. United States Att'y Gen., 488 F.2d 667 (5th Cir. 1974), *cert. denied*, 419 U.S. 846 (1974); Burdette v. Nock, 480 F.2d 1010 (6th Cir. 1973); Noorlander v. United States Att'y Gen., 465 F.2d 1106 (8th Cir. 1972), *cert. denied*, 410 U.S. 938 (1973).

The state cases favoring delay, finding no grievous loss caused by delay are: Cooper v. Lockhart, 489 F.2d 308 (8th Cir. 1973); Pavia v. Hogan, 386 F. Supp. 1379 (N.D. Ga. 1974); State v. Sheehy, 114 N.H. 305, 337 A.2d 348 (1975); Duncan v. Ricketts, 232 Ga. 89, 205 S.E.2d 274 (1974).

30. Cases cited note 29 *supra.*

31. Small v. Britton, 500 F.2d 299, 301, 302 (10th Cir. 1974). In *Small* no consideration was given to any other possible disadvantageous consequences of the hearing delay. In approving the delay, the court, instead focused solely on the fact that petitioner did not show how an earlier hearing could have affected the outcome of the revocation hearing which was finally held.

32. Cook v. United States Att'y Gen., 488 F.2d 667, 673 (5th Cir. 1974), *cert. denied*, 419 U.S. 846 (1974). The Court in *Cook* emphasized the fact of parolee's conviction for an intervening crime. "We are unable to conclude on this record that the extent of such deprivation is so great or so unreasonably related to the very existence of a detainer based as it is in this case on a serious and incontestable parole violation, as to require that the revocation hearing be held at the commencement of the intervening sentence." *Id.* at 673.

33. *Id.* at 673. The Fifth Circuit concluded, "We do not close our eyes to the fact that appellee may have been disadvantaged in certain respects by the deferral of the revocation hearing, but we are unable to conclude that the disadvantage constitutes such grievous loss—in due process terms as to require the hearing to be held prior to service of the intervening sentence or to permit the intrusion by a court into this highly discretionary activity." *Id.* at 671.

delay adversely affected the decision to revoke parole.[34] These courts reject the contention that lack of evidence sufficient to alter a conviction and subsequent revocation eliminates the need for a prompt hearing. The test which these courts apply for grievous loss is not merely whether delay will affect the outcome of the revocation hearing, but also whether delay will cause further curtailment of the parolee's freedom when he is convicted of an intervening crime.[35]

These courts illustrate an understanding that the nature of the parolee's interest is within the contemplation of the "liberty" language of the due process clause. They recognize that, notwithstanding the intervening conviction, a delayed parole revocation hearing may violate the parolee's freedom causing grievous loss.[36] They conclude that delay may curtail freedom by depriving the parolee of a chance to obtain concurrent sentencing thereby causing a longer total period of imprisonment or by restricting, via the detainer mechanism, his conditions of confinement while in prison.

The courts which use curtailment of liberty as the test for grievous loss further illustrate an understanding that the purpose of the hearing goes beyond merely considering the question of whether parole should be revoked.[37] The import of these decisions is that a conviction during parole does not dispense with the need for a hearing although it may alter its content.[38] The hearing is still required to consider mitigating evidence and concurrent sentencing, factors which are intricately related to the parolee's interest in freedom.

The different ways in which the courts regard the nature of the parolee's right and the purpose of the hearing account for their conflicting interpretations of what constitutes grievous loss. An examination of the reasons

34. The federal cases which apply a curtailment of liberty test to determine whether grievous loss results from delay are: United States *ex rel.* Hahn v. Revis, 520 F.2d 632 (7th Cir. 1975); Beshers v. Ciccone, 517 F.2d 1082 (8th Cir. 1975); Wingo v. Ciccone, 507 F.2d 354 (8th Cir. 1974); Wade v. United States Bd. of Parole, 392 F. Supp. 327 (E.D. Wash. 1975); Wells v. Wise, 390 F. Supp. 229 (N.D. Cal. 1975); Arnold v. United States Bd. of Parole, 390 F. Supp. 1177 (D.D.C. 1975); Fitzgerald v. Sigler, 372 F. Supp. 889 (D.D.C. 1974); Jones v. Johnston, 368 F. Supp. 571 (D.D.C. 1974); Sutherland v. District of Columbia, 366 F. Supp. 270 (D.D.C. 1973). The state cases which apply a curtailment of liberty test to determine whether grievous loss results from delay are: Wright v. Regan, 46 App. Div. 2d 163, 361 N.Y.S.2d 437 (4th Dep't 1975); *In re* Rixner, 39 Cal. App. 3d 465, 114 Cal. Rptr. 147 (1974); *In re* Valrie, 12 Cal. 3d 139, 524 P.2d 812, 115 Cal. Rptr. 340 (1974); Callison v. Michigan Department of Corrections, 56 Mich. App. 260, 223 N.W.2d 738 (1974).

35. *See* cases cited note 34 *supra.*

36. *See* cases cited note 34 *supra.*

37. *See* cases cited note 34 *supra.*

38. A conviction during parole may alter the content of a revocation hearing, since the question of parole violation is proven by the conviction for the intervening crime and need not be reconsidered. However, the hearing is still required to consider mitigating evidence and concurrent sentencing which are intricately related to the parolee's interest in freedom.

advanced in support of their opposing conclusions is crucial to a complete understanding of the delay problem and all its ramifications.

JUDICIAL RESPONSE TO THE PROBLEM OF DELAYED PAROLE REVOCATION HEARINGS

Delay-Approving Rationale

The delay-approving courts conclude that the nature of the parolee's interests affected by delay are not within the contemplation of the "liberty or property" language of the due process clause.[39] Their rationale for this position is two-fold. First, they rely on statutory language to support this judicial conclusion.[40] Second, they contend that the right to a revocation hearing can be conditioned on the parolee's completion of the intervening sentence, because prisoners incarcerated for intervening crime have no interest in liberty worthy of constitutional protection.[41]

When the federal government is the revoking authority, its argument in favor of delay has the benefit of statutory language providing that the timing of the revocation hearing is conditioned upon the revoking authority's actual custody over the parolee-prisoner.[42] Some states have the benefit of similar statutory language which authorizes delay.[43]

39. Cases cited note 29 *supra.*

40. 18 U.S.C. § 4207 (1970) provides:

> A prisoner retaken upon a warrant issued by the Board of Parole, shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board.
>
> The Board may then, or *at any time in its discretion,* revoke the order of parole and terminate such parole or modify the terms and conditions thereof.
>
> If such order of parole shall be revoked and the parole so terminated, the said prisoner may be required to serve all or any part of the remainder of the term for which he was sentenced (emphasis added).

28 C.F.R. § 2.40 (1975) the implementing regulation for 18 U.S.C. § 4207 (Supp. 1975) provides:

> A prisoner who is retaken pursuant to a warrant issued by the Board or a member thereof shall, while being held in custody under authority of such warrant awaiting possible return to a Federal institution, be afforded a preliminary interview by an official designated by the Board. Following receipt of a summary or digest of the preliminary interview, the Board shall afford the prisoner an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board. If the prisoner requests a local hearing prior to return to a Federal institution in order to facilitate the retention of counsel or the production of witnesses, and if he has not been convicted of a crime committed while under community supervision, and if he denies that he has violated any condition of his release, he shall be afforded a local revocation hearing reasonably near the place of the alleged violation . . . Otherwise, he shall be given a revocation hearing after he is returned to a Federal institution. Following the revocation hearing, the Board may then or at any time within its discretion revoke and terminate the order of parole or mandatory release or modify the terms and conditions thereof. . . .

41. *See* Small v. Britton, 500 F.2d 299 (10th Cir. 1974); Trimmings v. Henderson, 498 F.2d 86 (5th Cir. 1974); Cook v. United States Att'y Gen., 488 F.2d 667 (5th Cir.), *cert. denied,* 419 U.S. 846 (1974); Noorlander v. United States Att'y Gen., 465 F.2d 1106 (8th Cir. 1972), *cert. denied,* 410 U.S. 938 (1973).

42. Cases cited note 41 *supra.*

43. *See, e.g.,* Duncan v. Ricketts, 232 Ga. 89, 205 S.E.2d 284 (1974); GA. CODE ANN. § 77-159 (1971).

The federal statute governing parole revocation provides that a parolee is entitled to a hearing only after he is retaken upon a warrant and returned to federal custody. The parolee is not returned to federal custody until the parole violator warrant is executed.[44] While a parole violator's warrant must be issued within the maximum term of the sentence in accordance with the federal parole statute, it need not be executed during this period.[45] Instead, the warrant may be held in abeyance, while the parolee serves his sentence under an intervening conviction, the occurrence of which prompted the issuance of the violator's warrant, and may then be executed following completion of the intervening sentence.[46]

The delay-approving courts emphasize that both statute and precedent sanction conducting parole revocation hearings after execution of the war-

44. 18 U.S.C. § 4207 (Supp. 1975) provides that a parolee is entitled to a hearing only after the warrant is executed by the authority taking the parolee back into custody.

45. 18 U.S.C. § 4205 (Supp. 1975) (emphasis added) provides:

> A warrant for the retaking of any United States prisoner who has violated his parole, may be *issued* only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the custody of the Attorney General *under said warrant*, and the time the prisoner was on parole shall not diminish the time he was sentenced to serve.

It should be noted, in conjunction with sections 4205 and 4207 of Title 18 that one rationale for delaying the revocation hearing is that upon execution of the parole revocation warrant the prior sentence automatically runs concurrently with the intervening sentence. The delay approving courts maintain that delay of the revocation hearing is necessary in order to protect the discretion of the parole board to decide that the remainder of the original sentence should run consecutively to the intervening sentence. *See, e.g.*, Cook v. United States Att'y Gen., 488 F.2d 667, 670 (5th Cir.), *cert. denied*, 419 U.S. 846 (1974).

In order to avoid the effect of 18 U.S.C. § 4205 (Supp. 1975) which causes the original sentence to run concurrently with the intervening sentence upon *execution* of the parole revocation warrant, it is a common parole board practice to lodge the warrant as a detainer, but to delay its execution, and thus the hearing thereon, until just prior to completion of the sentence being served. This rationalization finds support in the pre-*Morrissey* case of Zerbst v. Kidwell, 304 U.S. 359 (1938). *See also* Noorlander v. United States Att'y Gen., 465 F.2d 1106 (8th Cir. 1972), *cert. denied*, 410 U.S. 938 (1973); Tanner v. Moseley, 441 F.2d 122 (8th Cir. 1971); Hash v. Henderson, 385 F.2d 475 (8th Cir. 1967).

The Seventh Circuit recently confronted the conflict between a prompt hearing requirement and parole board discretion. The court recognized that according to the policy, if a revocation hearing must be held shortly after a parolee is incarcerated for an offense committed while on release, the board is required to execute the warrant prior to such hearing. Execution of the warrant causes the parolee's initial unexpired sentence to automatically run, and as a result, the board would not be able to penalize parole violators by imposing the unexpired sentence to run consecutively to the intervening sentence. The solution of the Seventh Circuit was to require a hearing prior to the execution of the warrant. Execution of the warrant is no longer a condition precedent to the revocation hearing and the parole board's discretion to impose consecutive sentences at that hearing remains fully intact. *See* United States *ex rel.* Hahn v. Revis, 520 F.2d 632 (7th Cir. 1975).

46. *See, e.g.*, Cook v. United States Att'y Gen., 488 F.2d 667, 670 (5th Cir.), *cert. denied*, 419 U.S. 846 (1974).

rant, and place no limits on the time which may elapse between issuance and execution of the warrant.[47] Considerations of administrative convenience provide additional justification for imposing actual custody over the paroleeprisoner as a condition precedent to the vesting of the hearing right.[48] These courts have emphasized the inconvenience of requiring the governmental unit not having custody to carry out a revocation hearing by either transporting prisoners to the revoking authority, transporting parole officers to the prisoner, or holding ex parte proceedings.[49]

One state and two federal courts relying on statutory authority have reasoned that execution of the warrant by the revoking authority taking actual custody of the parolee triggers the duty to provide a parole revocation hearing.[50] They contend that the "in custody" statutory requirement is consistent with due process since *Morrissey* only requires that a revocation hearing take place within a reasonable time after the parolee is "taken into custody."[51] The crux of their argument is that a parolee is "taken into custody" when returned to the custody of the revoking authority. These courts concluded that the parole board need not grant a *Morrissey* type revocation hearing to a parolee at the commencement of a sentence for a crime committed while on parole where a parole violator warrant has been issued but

47. *Id.* at 671.

48. *See, e.g.*, Noorlander v. United States Att'y Gen., 465 F.2d 1106 (8th Cir. 1972), *cert. denied*, 410 U.S. 938 (1973). The court pointed out that the law is well established that it is the issuance of the warrant by the parole board and not its execution that must be within the statutory period. Any other rule, noted the court, would subject the board to obvious administrative difficulties that would frequently render enforcement impossible.

49. Other courts, however, have pointed out that administrative inconvenience is no excuse for constitutional deprivation and such inconvenience to parole authorities can be reduced by careful planning.

The Supreme Court foresaw that there would be some disruptive impact which would inevitably follow from the rule that due process was required for parole revocation. The Court stressed that flexibility would be allowed in revocation proceedings:

> While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, documentary evidence. Nor did we intend to foreclose the states from holding both the preliminary and the final hearings at the place of violation or from developing other creative solutions to the practical difficulties of the *Morrissey* requirements.

Gagnon v. Scarpelli, 411 U.S. 778, 782 n.5 (1973).

In Cooper v. Lockhart, 489 F.2d 308, 317 (8th Cir. 1973), the court confronted the practical administrative objections of implementing the prompt parole revocation hearings. The court pointed out that the custody state and the state requesting the delay might work out informal procedures that would furnish the latter with adequate information on which to exercise its judgment whether or not to continue the delay.

50. Cook v. United States Att'y Gen., 499 F.2d 667 (5th Cir.), *cert. denied*, 419 U.S. 846 (1974); *see also* Small v. Britton, 500 F.2d 299 (10th Cir. 1974); Trimmings v. Henderson, 498 F.2d 86 (5th Cir. 1975); Duncan v. Ricketts, 232 Ga. 89, 205 S.E.2d 274 (1974).

51. *See* cases cited note 50 *supra*.

returned unexecuted pending completion of the intervening sentence and return to the custody of the revoking authority.[52]

A second argument made by the federal courts in favor of delaying the revocation hearing is that conviction for an intervening crime warrants delay until the intervening sentence is served and the prisoner is returned to the custody of the revoking authority.[53] Implicit in the acceptance by the courts of the statutory requirement that a prisoner be returned to the custody of the revoking authority before his right to a hearing vests is the assumption that prisoners incarcerated for intervening crimes have no interest in liberty worthy of constitutional protection.[54]

Delay-Critical Rationale

The delay-critical courts conclude that the nature of the parolee's interests affected by delay are within the contemplation of the "liberty" language of the due process clause. The Seventh Circuit very recently recognized that such delay severely curtailed the liberty of the parolee-prisoner resulting in a violation of due process.[55] Among the elements of curtailed liberty noted by the court as sufficient to meet the grievous loss test of *Morrissey* were: prejudice in the opportunity to defend against the violation charged or to demonstrate mitigating evidence, and loss of the chance for concurrent sentencing causing a longer total period of imprisonment.[56]

An individual's right to due process in the parole revocation context is not only protected from direct infringement, but also from indirect infringement such as the conditioning of that right on the completion of an intervening criminal sentence.[57] Protection of an individual's right to due process from indirect infringement is sometimes called the doctrine of "unconstitutional conditions," which has found expression in judicial opinions dealing with diverse government benefits.[58]

The Supreme Court in *Wolff v. McDonnell*[59] extended to prisoners the

52. *See* cases cited note 50 *supra.*
53. *See* cases cited note 41 *supra.*
54. *See* cases cited note 29 *supra.*
55. United States *ex rel.* Hahn v. Revis, 520 F.2d 632 (7th Cir. 1975).
56. *Id.* at 635.
57. *See, e.g.*, Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1596 (1960).
58. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 493 (1972) (parole revocation hearings); Bell v. Burson, 402 U.S. 535, 539 (1971); Graham v. Richardson, 403 U.S. 465 (1971); Goldberg v. Kelly, 397 U.S. 254, 256 (1970); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969) (welfare benefits); Pickering v. Board of Education, 393 U.S. 563, 568 (1968); Sherbert v. Verner, 374 U.S. 398, 404 (1963) (striking down discriminatory unemployment compensation statute that denied benefits to Seventh Day Adventist who refused to work on Saturday).
59. 418 U.S. 539 (1974).

due process guarantees recognized in *Morrissey*[60] as applicable to parolees. Although *Morrissey* and *Wolff* are most important for their statement of the principles underlying the grant or denial of due process, their teachings on unconstitutional conditioning of prisoner rights are particularly relevant to the delay problem. These two cases provide the most compelling constitutional answer to hearing delay supported by statutory language and conditioned on the parolee's completion of the intervening sentence.

The courts which favor a prompt hearing have concluded that *Morrissey*, as interpreted by the Supreme Court in *Wolff*, rejects the argument that the parolee-prisoner has no right to a revocation hearing until the revoking authority regains actual custody.[61] Although *Wolff* did not extend all of *Morrissey's* procedural protections to the inmate, the court held that minimal due process requirements, including notice and hearing must be provided in prison disciplinary proceedings.[62] This clarification of *Morrissey's* application to prisoners still in the penitentiary as well as to those who are at liberty on parole would seem to prohibit conditioning the right to a revocation hearing on completion of the intervening sentence.[63] It undercuts the conclusion of the delay-approving courts that a parolee serving an intervening sentence does not have a right to revocation hearing and notice as long as he is in prison for that intervening crime and not in the custody of the revoking authorities. As the Court emphasized in *Wolff*, "though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime."[64]

An examination of the purpose of the parole revocation hearing reveals that the timing of the hearing cannot be conditioned on the completion of the intervening sentence. *Wolff's* impact on the question of prisoner's constitutional rights has gone beyond the context of prison disciplinary proceedings.[65] Some federal courts have interpreted *Wolff* as invalidating the distinction made by delay-approving courts between a parole violator warrant which has been merely issued and one which has been executed.[66] They have rejected the holding of these courts that the time at which a hearing must be held is controlled by execution of a warrant.[67] Further, they have

60. 408 U.S. 471 (1972).
61. *See, e.g.*, Pavia v. Hogan, 386 F. Supp. 1379 (N.D. Ga. 1974).
62. 418 U.S. 539, 542 (1974).
63. Pavia v. Hogan, 386 F. Supp. 1379 (N.D. Ga. 1974).
64. 418 U.S. at 555.
65. Although *Wolff* dealt with prison discipline, its extension of due process to prisoners undermines the argument that a parolee serving an intervening sentence does not have a right to *Morrissey* protection as long as he is in prison for that intervening crime. *See also* Pavia v. Hogan, 386 F. Supp. 1379, 1384 (N.D. Ga. 1974).
66. *See* Beshers v. Ciccone, 517 F.2d 1082 (8th Cir. 1975); Pavia v. Hogan, 386 F. Supp. 1379 (N.D. Ga. 1974).
67. *See* cases cited note 66 *supra*.

not accepted the conclusion that a warrant is not executed until the prisoner is released from his intervening confinement and retaken into custody. They have concluded that the assumption that a prisoner's rights under *Morrissey* hang in suspended animation until he has served his intervening sentence is not consistent with *Wolff's* apparent rejection of the custodial status of the prisoner as determinative of when a prisoner's constitutional rights vest.[68]

The conclusion of the delay-critical courts that the revocation hearing should occur before the intervening sentence is served is supported by the holding in *Wolff* that the nature of due process requires that a hearing be conducted at a "meaningful time and in a meaningful manner."[69] The courts which favor timely revocation hearings recognize the fact that revocation and subsequent reincarceration do not always follow, even where the parole violation was the commission of another crime.[70] They recognize that the nature of the hearing is such that delay may result in the loss of essential witnesses or evidence and the continuation of unnecessary incarceration or other limitations on personal liberty.[71] A prompt hearing to adduce evidence on these matters is of vital importance even to a parolee whose parole violation has already been established by a court of law.

While it is true that the fact of the parolee-prisoner's guilt cannot be relitigated, the revocation hearing may provide an opportunity for him to present certain mitigating circumstances affecting revocation and sentencing.[72] Recently, the Seventh Circuit, finding the reasoning of the Eighth

68. Pavia v. Hogan, 386 F. Supp. 1379 (N.D. Ga. 1974).

69. Wolff v. McDonnell, 418 U.S. 539 (1974). *See also* Armstrong v. Manzo, 380 U.S. 545, 550 (1972) which held there is a basic requirement of notice where the result of a judicial proceeding was permanently to deprive a legitimate parent of all rights to the child. In so holding the court noted that a fundamental requirement of due process is the opportunity to be heard which must be granted at a meaningful time and in a meaningful manner.

70. Gagnon v. Scarpelli, 411 U.S. 778, 784 & n.8 (1973); Cooper v. Lockhart, 489 F.2d 308, 314 & n.11 (8th Cir. 1973); DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH AND CONDITIONS OF SENTENCE 283, 369-74 (1969) [hereinafter cited as DAWSON]. It should be noted that taking no action and returning the parolee to the institution are not the only alternatives available to the parole board. According to the National Advisory Commission on Criminal Justice Standards and Goals, REPORT ON CORRECTIONS 407 (1973), short term confinement or special restrictions can be useful in dealing with parolees instead of an automatic return to long term confinement.

71. *See* Wolff v. McDonnell, 418 U.S. 539 (1974); Smith v. Hooey, 393 U.S. 374 (1969); Cooper v. Lockhart, 489 F.2d 308 (8th Cir. 1973). In *Smith*, the Supreme Court showed concern that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving and the possibility for concurrent sentencing may be forever lost if trial of the pending charge is postponed. 393 U.S. at 378. The court in *Cooper*, relying on *Smith*, said the possibility for concurrent sentencing is just as much obscured and "forever lost" if a parole revocation hearing is postponed. 489 F.2d at 310.

72. The Supreme Court has recognized that the effect of delay on the preservation of evidence may very well impair the ability of an accused to defend himself. While evidence and witnesses disappear, memories fade, and events lose their perspective, a man isolated in prison is powerless to exert his own investigative efforts to combat these erosive effects of the passage of time. Postponement of the adjudication of issues can

Circuit persuasive, concluded that a parole violator has a substantial interest in presenting mitigating facts that could influence the parole board either to set aside the warrant or to execute it, giving the violator the benefit of concurrent sentences.[73]

Finally, the courts which favor timely hearings note that not only the prisoner, but society as well has an interest in providing a fair revocation hearing. The Supreme Court in *Morrissey* noted:

> Society has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions. Society has a further interest in treating the parolee with basic

harm both the prisoner and the state and lessens the probability that final disposition of the case will do substantial justice. Smith v. Hooey, 393 U.S. 374 (1969); Peyton v. Rowe, 391 U.S. 54, 62 (1968).

73. United States *ex rel.* Hahn v. Revis, 520 F.2d 632 (7th Cir. 1975). It should be noted that a prior federal sentence can be served concurrently with a subsequent state sentence being served in a state institution.

The question of concurrent sentencing raises the sensitive problem of conflicting sovereignties. In Fitzgerald v. Sigler, 372 F. Supp. 889 (D.D.C. 1974), the sentencing judge ordered the sentence imposed by him to run concurrently with any other sentence then being served by petitioner. The petitioner alleged that by deferring action on the parole violation warrant and, thus, deferring the running of the original unexpired sentence until completion of the intervening sentence, the parole board caused the unexpired sentence to run consecutively to the intervening sentence, thereby frustrating the clear intention of the original sentencing judge. The court held that the parole board had not usurped the power of the sentencing judge by preventing the intervening and unexpired sentences from running concurrently.

In Tippit v. Wood, 140 F.2d 689, 692 (D.D.C. 1944), in which the petitioner had committed a criminal offense while on parole from a previous conviction, the district court imposed a sentence that required the intervening sentence and the unexpired portion of the original sentence to run concurrently with each other. The appellate court ruled the sentence invalid and held that the sentencing judge had no power to make the intervening sentence run concurrent with the original unexpired sentence, or to tell the parole board how it must act in light of the intervening sentence. The rule has been that the parole board has the administrative power to decide whether a sentence for an offense committed while on parole will run concurrent with the unexpired portion of the original sentence, imposed because of parole violation. The power of the board in this area has been held to be exclusive. Cox v. Feldkamp, 438 F.2d 1, 3 (5th Cir. 1971).

An unusual sentencing situation recently confronted the Seventh Circuit in United States *ex rel.* Hahn v. Revis, 520 F.2d 632 (7th Cir. 1975). It should be noted, however, that the sentencing situation in *Hahn* is distinct from the situation previously described. In *Hahn*, state and federal sentences were judicially imposed concurrently prior to the intervening crime committed by petitioner while on parole. The intervening state sentence was served and completed after four months. After that sentence, petitioner Hahn remained incarcerated in an Illinois state prison serving the time remaining on his original Illinois state sentence *consecutively* with the federal sentence. The federal authorities by delaying the parole revocation decision prevented the federal sentence from running. This action, in effect modified the concurrent sentencing orders of the federal and state judges imposed prior to any conviction for intervening criminal activity. The only decision the federal parole board had the authority to make was that the four month sentence for the intervening crime committed while on parole should not be served concurrent to any previous sentence. The parole board had no authority to modify the two previous sentences which both federal and state judges had imposed concurrently.

> fairness; fair treatment will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.[74]

In summary, the "in custody" rationale for hearing postponement, whether supported by considerations of statutory language or the parolee's status as prisoner, is unacceptable because delay deprives the prisoner of a timely hearing when timing goes to the very essence of due process in terms of grievous loss to the prisoner. The custodial status of the revoking authority via the agency of the actual custodial authority should, therefore, be held sufficient to satisfy the "in custody" requirement. Statutory interpretation cannot sustain constitutional loopholes for violation of due process. Nor can the status of the parolee as prisoner incarcerated for an intervening crime justify constitutionally distorted "conditional" due process which sustains the adverse effects of delay on the prisoner's interests.

The courts which recognize that delay causes grievous loss illustrate an understanding of the nature of the parolee's interest and of the purpose of the revocation hearing. They fail to realize, however, that a prompt hearing is only a partial solution to grievous loss caused by delay. The courts have held that the detainer effects are themselves a due process violation. Yet, they have failed to integrate the constitutional problems raised by detainers under the grievous loss analysis with their prompt hearing solution.

Implementation of a prompt revocation hearing will not necessarily eliminate the adverse effects of the detainer on the parolee's conditions of confinement and rehabilitation opportunities. Although hearing delay triggers the detainer mechanism, the detainer will only be removed if concurrent sentences are imposed at the revocation hearing. If consecutive sentences are imposed, the detainer remains intact as a consecutive sentence detainer with the same limiting effects on the prisoner's liberty. Thus, the due process violation attributable to the detainer is not eliminated. This due process violation amplifies the consecutive sentencing penalty. A recent major decision in the Seventh Circuit illustrated the need for more than a prompt parole revocation hearing to remedy the adverse effects of the detainer process.[75]

THE DETAINER: AN UNRESOLVED PROBLEM

In *United States ex rel. Hahn v. Revis*,[76] the Seventh Circuit confronted the question of whether delaying a parole revocation hearing and thereby prolonging the effects of the revocation detainer can cause grievous loss in due process terms to the prisoner. The petitioner was sentenced on a state and federal charge. Both the state and federal sentencing judges ordered

74. 408 U.S. 484 (1972).
75. United States *ex rel.* Hahn v. Revis, 520 F.2d 632 (7th Cir. 1975).
76. *Id.*

that the sentences be served concurrently. While on parole from the federal prison, the parolee was convicted and sentenced to four months for battery. After completion of the short sentence he remained in prison on the original state charge while the Federal Board of Parole delayed the parol revocation decision and caused the parole violation warrant to be lodged against the prisoner as a detainer. The Federal Parole Board thereby held open the possibility that the remainder of the original federal sentence would be served consecutive to the state sentence and contrary to the explicit intention of both the federal and state sentencing judges.[77] The Federal Parole Board likewise prolonged the effects of the detainer on the prisoner as long as he served the state sentence consecutive to the federal sentence.[78]

The Seventh Circuit held that due process mandated a prompt revocation hearing.[79] The court recognized that the parolee-prisoner suffered grievous loss from the effects of the delayed hearing and the outstanding detainer. Among the elements of grievous loss which the court recognized were: Impairment of rehabilitation due to the existence of the detainer; prejudice in the opportunity to defend against the violation charged or to demonstrate mitigating evidence; and loss of the chance for concurrent sentencing causing a longer total period of imprisonment.[80]

Although the holding of the Seventh Circuit requires a prompt revocation hearing, it leaves the parole board with the same discretionary power to withdraw, execute, or retain the warrant lodged as a detainer thereby providing only a partial solution to the constitutional problems caused by delayed revocation hearings. The loss of evidence and the loss of a chance for concurrent sentencing would be prevented by *Hahn's* prompt hearing requirement. However, even if the revocation hearing were held and parole were revoked, the parole board could still make a decision resulting in grievous loss to the parolee-prisoner by deciding to retain the warrant as a consecutive sentence detainer. Only if the prisoner were sentenced concurrently on both the intervening crime and the original crime for which the prisoner was paroled would the removal of the detainer be guaranteed. If parole were revoked, but no concurrent sentence granted, the detainer would remain intact as a consecutive sentence detainer making the prisoner's ultimate sentence unclear, adversely affecting his conditions of confinement and undermining rehabilitation efforts.[81]

77. *Id.* at 635.
78. *Id.*
79. *Id.* at 637.
80. The Seventh Circuit relied on Strunk v. United States, 412 U.S. 434, 439 (1973) and Smith v. Hooey, 393 U.S. 374 (1969) to support its finding of grievous loss from hearing delay in the areas of rehabilitation, concurrent sentencing and loss of evidence.
81. Dauber, *supra* note 9, at 697. "The greatest cost of detainers to the criminal justice system and to society as a whole is interference with the rehabilitation of inmates . . . the presence of detainers needlessly complicates rehabilitation efforts by interfering

Hahn illustrates the necessity for an evaluation of the effects of detainers on prisoners regardless of their origin. The constitutional sufficiency of *Hahn's* partial solution is controversial. The courts disagree as to whether the adverse effects of detainers are grievous enough in due process terms to warrant prevention by either banning the use of detainers completely or at least mitigating their effects.

Nature and Effects of Detainers

A detainer is a creature of convenience under which an authority having custody of a prisoner, upon request from another jurisdiction agrees to hold the prisoner pending release on another charge.[82] The detainer can be a copy of an arrest warrant, indictment, or commitment order, or simply a letter or note sent to the prison by a prosecutor, court, police chief, parole board or any other official empowered to take people into custody, asking to be informed by the prison officials when the inmate in question is to be released.[83] Having no force in law, the detainer is at best a matter of comity or compact and assures that the prisoner will not abscond after release in one jurisdiction before he can be held to account for unresolved charges in another.[84]

Detainers affect the prisoner's conditions of confinement and the nature of his rehabilitation opportunities.[85] The existence of a detainer often results in a maximum security classification with attendant restrictions of freedoms.[86] Prisoners subject to detainers are prevented from participating in work release programs as well as various educational and recreational programs.[87] The psychological effects of the detainer on the prisoner are also notable. Anxiety from the uncertainty of future imprisonment and depression from the nature of the inmate's current conditions of confinement may leave the prisoner with little inclination toward self-improvement.[88] The

with programming, reducing inmate's incentive, preoccupying his attention, and limiting his participation in certain minimal-custody programs."

82. Beshers v. Ciccone, 517 F.2d 1082, 1088 (8th Cir. 1975).

83. Dauber, *supra* note 9, at 670.

84. Beshers v. Ciccone, 517 F.2d 1082, 1088 (8th Cir. 1975).

85. Shelton, *supra* note 3, at 119, 122. In Jacob and Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 KAN. L. REV. 493, 582 (1970) [hereinafter cited as Jacob and Sharma] the authors point out that detainers sometimes are filed not to meet the needs of other agencies for a particular inmate, but as an additional means of punishing the inmate. Punitive consequences of a detainer placed on the prisoner vary from one institution to another. "Many detainers are filed for punitive reasons and are later withdrawn or not enforced, having served their purpose by curtailing prison privileges and preventing parole. It is openly admitted by some prosecutors that detainers are sometimes filed without intent to prosecute, but rather to bar parole or make parole more difficult, thereby punishing the inmate for the offense though he has not yet been tried or convicted. It is estimated that less than half of all filed detainers are exercised or filed with any intention of being enforced."

86. Cooper v. Lockhart, 489 F.2d 308, 314 & n. 10 (8th Cir. 1973).

87. Dauber, *supra* note 9, at 692, 693.

88. Smith v. Hooey, 393 U.S. 374 (1969).

rationale often advanced by the custodial authority for the added restrictions placed on the detainer prisoner is that an inmate with a detainer, regardless of its form or substance, must be watched more carefully.[89]

The Validity of a Detainer's Effects in Due Process Terms

For two reasons, courts have been reluctant to find that parole violation warrants lodged as detainers cause constitutionally cognizable grievous loss. First, they justify the effects of the detainer by the fact of the underlying conviction, and second, they devalue the detainer's effects by deferring to the administrative expertise of the detainer-requesting authorities.[90]

Noorlander v. United States Board of Parole[91] typifies an approach recognizing the adverse effect of treating inmates with detainers differently than other prisoners, but finding that the underlying conviction rationally supports the different treatment.[92] In *Noorlander*, the prisoner, alleging violation of due process, argued that the presence of the detainer made his intervening sentence more burdensome without any proceedings to determine the propriety of the increased harshness. The prisoner contended that the outstanding detainer rendered him ineligible for lower security custody and a variety of rehabilitation programs. The court responded that although the effect of the detainer may have rendered the prisoner's intervening sentence more burdensome than the sentences of other inmates not subject to a detainer, the intervening conviction justified the existence of the detainer and its adverse effects on the prisoner.[93]

In the court's opinion, to hold otherwise would have been tantamount to requiring correctional administrators to ignore the past records and behavior of prisoners. A different case might be presented, the court noted, if the

89. Bennett, *The Last Full Ounce*, 23 FED. PROB. No. 2 20, 21 (1959); *see also* Shelton, *supra* note 3, at 122, in which the author notes that authorities generally assume that an inmate with a detainer, no matter what its form or substance, must be watched more carefully. Prison administrators feel, that an inmate wanted by another criminal justice agency, especially for another charge, is a greater escape risk. The effect of this fear is that no one wants to make the hard decision between the relative risk of law violation at the present time and the long term gain if the parolee is allowed freedom to develop rehabilitative contacts with the outside world. Custodial classification of detainer prisoners, Shelton feels, should be based upon an individual evaluation process in order to prevent unnecessary curtailment of a prisoner's freedom.

90. Cook v. United States Att'y Gen., 488 F.2d 667, 673 (5th Cir.), *cert. denied*, 419 U.S. 846 (1974). In emphasizing the factor of the intervening sentence, the court said that it did not ignore the fact that the prisoner may have been disadvantaged in certain respects by the deferral of the revocation hearing, but went on to note that it was unable to conclude that the disadvantage constituted grievous loss so as to require the hearing prior to service of the intervening sentence. Noorlander v. United States Att'y Gen., 465 F.2d 1106, 1109 (8th Cir. 1972), *cert. denied*, 410 U.S. 938 (1973) rationalized the effects of the detainer by the fact of the underlying conviction.

91. 465 F.2d 1106 (8th Cir. 1972), *cert. denied*, 410 U.S. 938 (1973).

92. *Id.* at 1109.

93. *Id.*

offense upon which the detainer was based had not resulted in conviction. Implicit in the holding that an intervening conviction provides a rational basis for sustaining the detainer's adverse effects is the assumption that an incarcerated prisoner has no liberty worthy of constitutional protection.[94] It has been urged that the possible loss of individual liberty which was the focal thrust of *Morrissey*, is not present in a detainer situation because the individual is already incarcerated.[95]

The second reason for the court's reluctance to scrutinize the effects of parole revocation detainers in due process terms is an unwillingness to interfere with the administrative expertise of the detainer-requesting authorities.[96] In one case, the prisoner asserted that the deferral of the revocation hearing coupled with the presence of the detainer caused him great anxiety and interfered with the rehabilitation process because it is difficult for a parolee prisoner to become motivated while laboring under the uncertain prospect of further imprisonment following completion of his current sentence.[97] The court responded, "We are simply unqualified unauthorized and unwilling to second guess the parole board on a matter so peculiarly within its own expertise."[98] Warren Burger, now Chief Justice, writing in *Hyser v. Reed*,[99] said, "The function of the parole board involves the application of blended concepts of criminology, penology and psychology, and if the doctrine of 'administrative expertise' should carry weight anywhere it should do so in this area."[100]

A Detainer's Adverse Effects Outweigh the Other Interests Involved

Whether parole violator warrants lodged as detainers cause grievous loss in terms of due process depends on a balancing of the interests involved.[101] Before the balancing test is applied there must be a determination of whether the interest of the parolee affected by the detainer is within the "liberty" protected by due process. *Wolff v. McDonnell*[102] sustains the conculsion that an incarcerated prisoner has liberty worthy of constitutional protection. In that case the Supreme Court established the application of *Morrissey's* due process protections to prisoners still in the penitentiary as

94. *See* cases cited note 50 *supra.*
95. *See* cases cited note 50 *supra.*
96. *See* cases cited note 50 *supra.*
97. Cook v. United States Att'y Gen., 488 F.2d 667 (5th Cir.), *cert. denied,* 419 U.S. 846 (1974).
98. *Id.* at 673. *But see* Fitzgerald v. Sigler, 372 F. Supp. 889 (D.D.C. 1974) (rejecting the theory that a district court should not interfere with internal prison management especially where the conditions of confinement may cause a prisoner grievous loss in constitutional terms).
99. 318 F.2d 225 (D.C. Cir. 1963).
100. *Id.* at 227.
101. Morrissey v. Brewer, 408 U.S. 471 (1972).
102. 418 U.S. 539 (1974).

well as to those at liberty on parole. This clarification undercuts the argument that possible loss of individual liberty is not present in a detainer situation because the individual is already incarcerated. As the Supreme Court emphasized in *Wolff*, the objectives of the correctional system may diminish a prisoner's rights, yet, imprisonment for crime cannot deprive the prisoner of constitutional protections.[103]

Though delay of the parole revocation decision has no influence on the duration of the present confinement which is based on the conviction for the intervening crime, the fact remains that the delay decision triggers the detainer mechanism which will affect the prisoner's conditions of confinement and his opportunities for rehabilitation causing him "grievous loss." As recognized by the Supreme Court in *Smith v. Hooey*,[104] a detainer lodged against a prisoner whose trial is being delayed until completion of the intervening sentence subjects the prisoner to grievous loss in due process terms.[105]

> It is in their effect upon the prisoner and our attempts to rehabilitate him that detainers are most corrosive. The strain of having to serve a sentence with the uncertain prospect of being taken into the custody of another state at the conclusion interferes with the prisoner's ability to take maximum advantage of his institutional opportunities. His anxiety and depression may leave him with little inclination toward self-improvement.[106]

A parolee whose revocation hearing is similarly delayed suffers from the same emotional stress due to the uncertainty as to whether or not he faces further confinement.

The exclusivity of the requesting authority's administrative decision-making concerning what information it supplies to the custodial authority must be balanced against its effect on the prisoner's interests.[107] In practice, due to the many forms and sources of detainers, prisoners are placed on detentive status on the basis of different degrees of information and not as a result of applying "blended concepts of criminology, penology and psychology."[108] Many requests for detention do not even state the substance of the underlying charge.[109] Rarely, if ever, is the possible

103. *Id.* at 555.
104. 393 U.S. 374 (1969).
105. The Supreme Court in *Smith*, although not directly concerned with delayed revocation hearings, but rather with speedy trial for criminal indictments, did substantiate their findings of grievous loss to the prisoner as well as to the state by the use of a detainer. The Court interviewed the former Director of Federal Bureau of Prisons to confirm the fact that detainers lodged against a prisoner whose hearing is delayed subjected the prisoner to grievous loss in due process terms.
106. 393 U.S at 379.
107. Morrissey v. Brewer, 408 U.S. 471 (1972).
108. Dauber, *supra* note 9, at 673.
109. *Id.* at 672.

penalty noted,[110] and, in most cases, the requesting authority does not make known its intention with regard to pursuing the detainer.[111] These factors combine to leave prison officials without substantive bases for their actions.[112] Programming for the inmate cannot be undertaken intelligently, and in view of the rather uniform belief that inmates with detainers are escape risks, even that programming which can be attempted is further limited by the restrictions placed on the mobility of such inmates.[113] Allowing the requesting authority complete discretion in disclosing information forming the basis for its detention request prevents the agency most qualified from exercising its expertise. It is the present custodial authority, not the requesting authority, that can best make decisions affecting the prisoner's conditions of confinement and rehabilitation.[114] Thus, the interests of the prisoner in being treated fairly and on a rational basis are sufficient to outweigh any interests of the requesting authority based on control of its own administrative procedures.

Even in regard to the custodial authority's interest in penalizing the prisoner or preventing his escape, the further curtailment of the prisoner's liberty via the detainer should not be sustained without precedural due process.[115] Approving the effects of the detainer simply on the rationale that the past record and behavior of the prisoner as evidenced by the detainer justifies its adverse effects violates the spirit of due process. The resulting effects of a detainer on the prisoner's conditions of confinement and opportunities for rehabilitation support the conclusion that there is a need for a procedure by which the custodial authority is required to establish the nature of the basis for the detention request so as to enable the prisoner to defend against it.

110. *Id.*

111. *Id.*

112. *Id.* at 673, 674. A study of the detainer system in Massachusetts revealed that the process is used by a wide variety of criminal justice agencies to meet a variety of needs. These needs are reflected in the informal development of different types of detainers. It was discovered that the information about filed detainers that was available to prison administrators, those who must consider the detainers in their treatment of the inmates, was often incomplete and sometimes inaccurate. No one had a clear statistical picture of the role of detainers in their particular agency; nor in many cases were the procedures for handling detainers very clear. Written guidelines were generally nonexistent. Decision-making was summary and often automatic. The effect of such chaos was to make the operation of the detainer system practically invisible and, thus, to increase the difficulty of discovering the locus of responsibility for detainer decisions within the individual agencies.

113. Dauber, *supra* note 9, at 693 notes that closely related to the effect on rehabilitation is the effect on prison planning for the inmate. The lack of complete information on the inmate's future status makes intelligent long-term planning impossible. The result is likely to be ineffective or piecemeal planning, which usually is unproductive and wasteful.

114. Cooper v. Lockhart, 489 F.2d 308, 314 & n.10 (8th Cir. 1973).

115. Wolff v. McDonnell, 418 U.S. 539 (1974).

RECOMMENDATIONS

The balancing test which due process demands requires close scrutiny of the effects of the detainer system. Decisions considering the constitutional validity of detainer effects have notably lacked an in-depth examination of the actual detainer process. The federal courts, for the most part, have failed to examine the detainer process in the particular institution before rendering a decision concerning the effect of detainers on a prisoner's conditions of confinement in that institution.[116] No federal court, whether in favor of or opposed to parole revocation delay via the detainer mechanism, has based its judgment on the policies of the particular institution involved.[117] The detainer problem has been dealt with superficially, and general authorities have been relied upon for conclusions about the effects of detainers.[118] The decisions have failed to recognize the crucial fact that not only do the effects of detainers vary from institution to institution[119] but there are different types of detainers which themselves have varying effects on a prisoner's conditions.[120]

Courts which have found that the effects of a parole revocation detainer constitute grievous loss support their reasoning with conclusory statements rather than investigation.[121] The Seventh Circuit did so in *Hahn* when it stated: "The detainers curtail freedom, deprive prisoners of trusty status, rehabilitation and education programs and subject prisoners to classifications which are further freedom denying."[122] At least one decision was based on a more thorough investigation. The Supreme Court in *Smith v. Hooey*,[123] although concerned with speedy trials for criminal indictments rather than delayed parole revocation hearings, substantiated a finding of grievous loss resulting from a detainer by interviewing the former Director of the Federal Bureau of Prisons.[124]

Failure to conduct a detailed inquiry into the detainer process overlooks one very cogent argument for sustaining the constitutional validity of a detainer in a particular case. The effect of a detainer in a particular institution, because of its internal administrative policies, might not be adverse to a prisoner's conditions of confinement.[125] This situation could

116. *See* cases cited note 4 *supra.*

117. *See* cases cited note 4 *supra.*

118. *See, e.g.*, DAWSON, *supra* note 70, at 283 which is representative of a general study frequently referred to, yet its use is inadequate because the nature and effects of the detainer process differ from institution to institution as pointed out by Dauber, *supra* note 9, at 670 and Shelton, *supra* note 3, at 122.

119. Dauber, *supra* note 9, at 670.

120. *Id.*

121. *See* cases cited note 4 *supra.*

122. United States *ex rel.* Hahn v. Revis, 520 F.2d 632 (7th Cir. 1975).

123. 393 U.S. 374 (1969).

124. *Id.* at 378. The Director stressed that detainers have a corrosive effect on a prisoner's morale as well as on attempts to rehabilitate him.

125. Shelton, *supra* note 3, at 122.

arise in at least two cases. First, where a prison offers no rehabilitation programs and every prisoner is equally "deprived" regardless of the existence of a detainer, the argument that detainers caused grievous loss is not compelling.[126] Second, where the prison officials tailor custodial conditions to the nature of the detainer,[127] they would neither impose burdensome classifications[128] nor deny rehabilitation programs unless the nature of the detainer justified such action.[129]

The lack of uniformity in the area of detainers often results in invalid conclusions based on generalized studies. Until the detainer process is made more uniform, courts will have to look into the actual effect of the detainer on the confinement conditions and the rehabilitation opportunities of the prisoner involved in the particular case. In *Hahn*, the Seventh Circuit focused the test for grievous loss in the area of either evidence, concurrent sentences or detainers on the notion of "curtailment of liberty."[130] But even in applying this narrow test to detainers, the court must look into the policy of each prison administration with regard to detainers to determine two factors. First, whether the particular institution offers any opportunities which a detainer would adversely affect, and second, whether a parole revocation detainer has in fact such a liberty-depriving effect in that institution. Requiring prompt revocation hearings, as *Hahn* did, will eliminate the parole revocation detainer, but it can be replaced by a consecutive sentence detainer unless the parole board sentences the violator concurrently. Although the early hearing reduces the likelihood of evidence disappearing and gives the prisoner a chance to plead for a concurrent sentence, it does nothing to eliminate the effects of the detainer that will be lodged if a consecutive sentence is imposed. Thus, a prompt revocation hearing is not the total answer to the detainer problem.

A solution to the delay-detainer problem will have to both meet the needs of the various agencies utilizing detainers and eliminate the adverse effects on the prisoner's institutional conditions.[131] One solution proposed by the American Bar Association is for legislatures to provide that in no event should detainers in any way affect the conditions of serving a sentence.[132] At the very least the underlying charges of detainers should be

126. *Id.* Shelton points out that Indiana does not have work-release or study release programs.

127. Dauber, *supra* note 9, at 692. Dauber notes that in Massachusetts when prison personnel do look into the nature of the detainer, prisoners with an other-charges detainer or consecutive-sentence detainer from another jurisdiction are not permitted to participate in certain work-release programs. However, inmates with parole or probation violations or those whose detainers are based on very minor charges, *e.g.* nonsupport, illegitimacy, traffic violations, etc. are not restricted in this way.

128. *Id.* at 697, 698.

129. *Id.* at 692.

130. United States *ex rel.* Hahn v. Revis, 520 F.2d 632 (7th Cir. 1975).

131. Dauber, *supra* note 9, at 699.

132. Note, *Detainers and the Correctional Process*, 16 WASH. U.L.Q. 417, 439

explicit and the prison authorities should be required to look into the nature of the detainer to insure that any deprivations imposed are related to some rational correctional goal. The prisoner should be notified of the existence of the detainer and some type of review of the validity of the detainer should be promptly held, not necessarily conditioned upon a request, in order to prevent unconstitutional deprivations and further curtailment of liberty where unwarranted.[133]

CONCLUSION

Recent decisions have concluded that parolees who commit intervening crimes do suffer grievous loss when the revocation hearing is delayed until the intervening sentence is served.[134] The reasoning of these courts illustrates an enlightened understanding of both the purpose of the revocation hearing and the impact of delay on the parolee's liberty. These courts recognize the need for a prompt hearing because of the effects of delay on reincarceration, evidence and sentencing. They also recognize the grievous effects of the parole revocation warrant lodged as a detainer on the prisoner's conditions of confinement and opportunities for rehabilitation.

It should be noted, however, that these courts have failed to integrate the constitutional problems raised by detainers into their overall solution to the delay problem. The prompt hearing requirement will not necessarily eliminate the adverse effects caused by the detainer since it may remain intact, after the hearing, as a consecutive sentence detainer with the same limiting effects on the parolee's liberty. Thus, the due process violation

(1966) states: "The primary goal in solving the detainer problem is to insure to the extent possible, identical treatment of one accused of multi-jurisdictional offenses and one accused of the same crimes against a single jurisdiction."

133. Dauber, *supra* note 9, at 699-716; Shelton, *supra* note 3, at 119. It should be noted that some efforts have been made to deal with the administrative complexities of the detainer system. In 1955 the Council of State Governments formed the Committee on Detainers and Sentencing and Release of Persons Accused of Multiple Offenses. This committee proposed two types of legislation: (1) an act for the mandatory disposition of intrastate detainers and (2) an interstate agreement for the mandatory disposition of detainers from outside the incarcerating jurisdiction. Both of these statutes provide for notice to the inmate of detainers and, upon the inmate's demand, a time limitation for trial which if exceeded will result in dismissal of the underlying charge with prejudice. The basic components of the intrastate statute (published in 1958 in modified form as the Uniform Mandatory Disposition of Detainers Act) have been enacted in many states. Thirty-seven states, including Illinois, and the federal government have become parties to the Interstate Agreement on Detainers which resolves many of the transferral problems previously encountered between jurisdictions.

These statutes, while improving somewhat the technical efficiency of the detainer system, do not get at the heart of the problem—the adverse effect of the pending detainer on the inmate's treatment. Nor do these statutes even address the filing end of the process, where detainers are often lodged routinely with little thought about the merits of the underlying charges. Dauber, *supra* note 9, at 671, 672.

134. *See* cases cited note 34 *supra*.

attributable to the detainer would not be eliminated. This due process violation would in effect amplify the consecutive sentencing penalty.

These decisions illustrate the need for a new approach to the problem which goes beyond the requirement of a prompt hearing to eliminate the grievous loss which delay causes. The only complete solution to the liberty deprivations caused by the delay-detainer process at both the federal and state levels is a prompt hearing in conjunction with removal of the adverse effects of detainers where they serve no rational correctional purpose.

MARGARET J. FROSSARD

INDEX

TO

VOLUME 52